

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
In the Matter of:)	
)	
Cancellation of Awards Prior to)	WRITTEN DETERMINATION
Performance)	
)	
Department of Transportation)	
RFP No. 10322)	POSTING DATE: October 17, 2011
Annual Best Management Practice)	
For Maintenance of Water Quality at)	MAILING DATE: October 17, 2011
<u>Pre-Treatment Units</u>)	

This matter is before the CPO as a result of a protest by The Clearwater Group (Clearwater) of the South Carolina Department of Transportation's (SCDOT) intent to award to Green Site Services, Inc. (Green Site) With this request for proposals (RFP), SCDOT attempted to procure Annual Best Management Practice (BMP) for Maintenance of Water Quality at Pre-Treatment Units. (Ex. 1, p. 1, Description) Under Scope of Solicitation, the RFP reads:

SCDOT is requesting proposals to provide routine, scheduled maintenance of various structural best management practices (BMPs) throughout the state of South Carolina. The BMPs include primarily detention ponds and proprietary BMPs designed for storm water quality purposes. The proposal should provide recommendations to the SCDOT for the frequency of maintenance and/or inspections. The proposal must address the capabilities to repair any damaged detention ponds and proprietary BMPs. (Ex. 1, p.4)

In order to resolve the matter, the CPO conducted a hearing October 6, 2011. Appearing before the CPO were Clearwater, represented by Eugene C. McCall, Jr., Esquire, President; Green Site, represented by Thomas Dudley, III, Esquire; and SCDOT, represented by Glennith Johnson, Esquire.

Upon hearing the protest matter, the CPO concludes that the solicitation was flawed due to ambiguities in the scope of work and the term of the contract. Consequently, the CPO is compelled to intervene and direct that SCDOT's intent to award be cancelled after award, but prior to performance, under the authority granted by the South Carolina Consolidated Procurement Code (Code) Section 11-35-1520(7) and the South Carolina Budget and Control Board Regulation 19-445.2085(C).¹ The written determination follows.

BACKGROUND

On July 7, 2011, SCDOT issued an RFP seeking proposals for annual BMP. (Ex. 1) After a pre-proposal conference, SCDOT issued Amendment #1 on July 22, 2011 to address questions raised by the prospective bidders. (Ex. 2) On August 2, 2011, SCDOT opened the two proposals received. The prices offered were as follows:

<u>Offeror</u>	<u>Price Offer</u>
Green Site	\$134,956 per year (Ex. 9)
Clearwater	324,820 per year (Ex. 7)

The composite scores were: Green Site – 275.00 and Clearwater – 260.20. (Ex. 5) After evaluating the proposals, SCDOT posted an intent to award to Green Site on August 23, 2011. (Ex. 3)

On September 2, 2011, Clearwater filed a protest with the CPO alleging: (1) It is impossible to truly fulfill the contract requirements for the price of \$134,956 per year, (2) Green Site is not qualified to complete the work according to the Occupational Safety and Health Administration (OSHA) requirements for confined space, and (3) misleading information

¹ The CPO is ruling on the protest in a separate decision. However, relevant excerpts from the protest letter are quoted herein for clarification.

provided by SCDOT in the solicitation regarding the term of the contract and the inventory of SCDOT structural controls. According to law, on September 6, 2011, in response to the protest, SCDOT suspended its intent to award assuring that Green Site did not begin performance under the contract. (Ex. 4)

CONCLUSIONS OF LAW

After a notice of intent to award is issued, but prior to performance, the Code permits the cancellation and re-award of contracts or re-solicitation of proposals in accordance with the regulations of the Board. (Section 11-35-1520(7)) S.C. Regulation 19-445.2085(C) provides, in relevant part:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies, services, information technology, or construction being procured are no longer required;
- (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

(7) Administrative error of the purchasing agency discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

The South Carolina Procurement Review Panel (Panel) has expressly recognized the CPO's right to exercise his authority under Regulation 19-445.2085(C). See Protest of Specialty Underwriters and Appeal of Keenan & Suggs, Case No. 2004-2 (upholding the CPO's decision to cancel and resolicit due to inadequate and ambiguous specifications where the RFP contained confusing language); Protest of B&D Marine and Industrial Boilers, Inc., Appeal by C&C Boiler Sales & Services, Inc., Case No. 2000-12 (finding that cancellation and resolicitation was appropriate where the specifications were unduly restrictive and did not assure a cost effective procurement of the state's needs); Protest of Analytical Automation Specialists, Inc., Case No. 1999-1 (authorizing a CPO to cancel and resolicit the procurement where the specifications have been revised); and Protest of Blue Cross Blue Shield of South Carolina and Public Consulting Group, Inc., Case No. 1996-3 (holding that the CPO's cancellation of the award and order of resolicitation was justified because the solicitation contained inadequate and ambiguous specifications and an administrative error on the duration of the contract). In all of the above cases, the Panel found that cancellation and resolicitation were appropriate.

Scope of the Contract

First, I find that there were ambiguities in the solicitation regarding the scope of work. Under Scope of Solicitation, the RFP reads:

The SCDOT has recently completed an inventory of its post-construction BMPs statewide. The current inventory include approximately 47 detention ponds, 1 permanent sediment trap, 31 proprietary BMPs, and 9 infiltration ponds/trenches for a total of 87² known structural controls (see map under attachment). (Ex. 1, p. 5)

However, the referenced map attached to the RFP provides a listing by county of the SCDOT BMPs. The map identifies 57 detention ponds, 4 infiltration ponds, and 31 engineered devices for a total of 92 structural controls, which conflicts with the 87 stated in the RFP. (Ex. 1, attachment)

Moreover, SCDOT accepted questions from prospective offerors and issued Amendment # 1 to answer the questions received. Relevant to this issue, an offeror asked the question:

1. Question: Can we get addresses for all locations of the BMP's?
We would like to look at them so we can price this accurately.

Answer: Long/Lat for each unit is provided on the spread sheet.

The spreadsheet attached to Amendment #1 provides a detailed listing by county and location of the BMPs and lists 116 BMPs, which is different than either of the numbers provided in the RFP. However, the answer provided by SCDOT is confusing and does not clearly indicate whether this new number reflects how many sites the contractor is actually required to submit a proposal on and manage during the contract. Even at the hearing, SCDOT did not announce the exact number of structural controls that must be cleaned and maintained by the awarded contractor and that the evaluation and award were based upon.

Consequently, the offerors bid prices based upon significantly different numbers of structural controls covered by the solicitation. According to the testimony of the two bidders,

² Actually, the sum of the types of BMPs listed is 88, not 87.

Green Site bid on 85 BMPs³ and Clearwater bid on 116 locations⁴, which at least partly contributed to Green Site's price proposal being 58% lower than Clearwater's.

Green Site's significantly lower price affected the award. For the evaluation criteria, the composite scores were as follows:

<u>Evaluation Criterion</u>	<u>Clearwater</u>	<u>Green Sites</u>
Understanding of Scope	115	105
Qualifications & Experience	<u>120</u>	<u>110</u>
Subtotal	235	215
Price	<u>25.2</u>	<u>60</u>
Total Score	260.2	275

It is clear that Green Site and Clearwater offered prices for maintaining different numbers of structural controls and that difference may have contributed to Green Sites winning the award.

Based on the documents, the CPO cannot determine the number of BMPs solicited by SCDOT. The RFP indicates a total of 87 structural controls, yet the actual sum total of the components identified is 88 structural controls. The map attached to the RFP identifies 92 structural controls. The amendment identifies 116 structural controls, but the language of SCDOT's answer makes it unclear as to whether this is the revised number to be cleaned and maintained by the contractor and upon which the proposals should be submitted.

The CPO finds that the specifications regarding the scope of the work to be performed were clearly ambiguous. The scope of work is an essential element of any RFP. In this case, ambiguities caused the vendors to offer prices on different scopes of work, which affected their offered prices. Therefore, cancellation and resolicitation is warranted based on inadequate or

³ The CPO notes that 85 was not the correct number of sites regardless.

⁴ However, according to Clearwater's bid, they bid on 112 sites; 112 was not the correct number of sites either.

ambiguous specifications due to an apparent administrative error and because cancellation is clearly in the best interests of the state. Regulation 19-445.2085(C)(1), (7) & (8). This will give SCDOT the opportunity to clarify its requirements regarding BMPs and will give the vendors an opportunity to bid on a level playing field.⁵

Term of the Contract

Second, I also find that the RFP contained conflicting terms as to the duration of the contract. Under the heading Maximum Contract Period – Estimate, the RFP stated, “Start Date: From 11/1/2011 End Date: 10/31/2014”, which indicates a total potential term of 3 years. (Ex. 1, p. 4) However, under the heading Term/Option to Extend – Initial Contract Period, the RFP stated, “[o]ne (1) year from the date of award. This contract will automatically extend on each anniversary date unless either party elects otherwise as allowed in the contract. The extensions may be less than, but will not exceed three (3) additional one year period”, which indicates a total potential term of 4 years.⁶

The CPO cannot determine whether the total potential term of the contract is three or four years from the face of the RFP. Although SCDOT stated that it intended for this to be a one year initial contract with two, one-year options to renew for a possible maximum contract period of three years, that is not what the RFP reflects and the above provisions cannot be reconciled. Accordingly, the term of the contract was clearly ambiguous. The term of the contract is essential, not only making it uncertain to the parties as the duration of the contract but also potentially affecting the prices offered. Therefore, cancellation and resolicitation is warranted

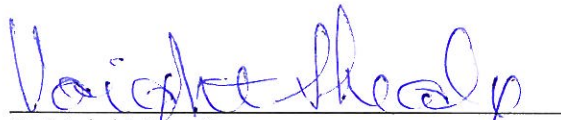
⁵ Although the CPO typically requests the agency to submit revised specifications for review when making a request for cancellation pursuant to Regulation 19-445.2085, SCDOT did not request the cancellation here.

⁶ Amendment #1 did contain a question from a vendor regarding the budget for the contract, but it is irrelevant for this analysis. By way of explanation, SCDOT’s answer, which becomes a part of the contract, only indicated that the budget was for “the duration of the contract”; it did not indicate what time frame the duration was. (Ex. 2, p. 5)

based on inadequate or ambiguous specifications due to an apparent administrative error and because cancellation is clearly in the best interests of the State. Regulation 19-445.2085(C)(1), (7) & (8).⁷

DETERMINATION

According to the Panel, an ambiguous solicitation leads to an ambiguous contract and “it is not in the State’s interest, or any other party’s interest, to enter a contract with ambiguous terms.” Protest of Blue Cross Blue Shield of South Carolina, Case No. 1996-3. Therefore, I find that a remedy pursuant to Regulation 19-445.2085 is necessary. Based on the circumstances detailed above, cancellation and resolicitation is the only appropriate remedy in this matter. Therefore, SCDOT is directed to cancel the intent to award and resolicit in accordance with the Code and Regulations.⁸



R. Voight Shealy
Chief Procurement Officer for Supplies and Services

October 17, 2011
Columbia, South Carolina.

⁷ On resolicitation, SCDOT should use the clause entitled “Term of Contract – Effective Date/Initial Contract Period (Jan 2006)”, which is contained in the South Carolina Enterprise Information System, instead of its clause entitled “Term / Option to Extend – Initial Contract Period” because it conflicts with the “Term of Contract – Option to Renew (Jan 2006)” clause. (Ex. 1, p. 27)

⁸ Although it is cumulative and therefore unnecessary for this written determination, the CPO also notes that the solicitation did not reflect how the price proposals would be evaluated. For instance, the RFP called for vendors to provide itemized prices for various services, and both Clearwater and Green Sites did so, yet SCDOT appears to have evaluated them on the total price offered for the first year of the contract. In its resolicitation, SCDOT should consider including a chart in the bidding schedule for vendors to submit their itemized prices as well as the price they are offering per unit and the annual total contract price and indicate what amounts they intend to evaluate. (At the very least, as stated previously, a bidding schedule may have made it clearer that Green Site’s evaluated price was based on 85 BMPs while Clearwater’s evaluated price was based on 112 BMPs.)

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2011)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011-2012, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).